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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 721

COMMERCIAL BARGE LINES, INC., *et al.*,
Appellants,

vs.

UNITED STATES OF AMERICA, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

REPLY TO MOTIONS TO AFFIRM.

DUDLEY B. TENNEY
63 Wall Street
New York 5, New York

NUEL D. BELNAP
One North LaSalle Street
Chicago 2, Illinois
Attorneys for Appellants

CAHILL, GORDON, REINDEL & OHL,
BELNAP, MCAULIFFE & SPENCER
Of Counsel

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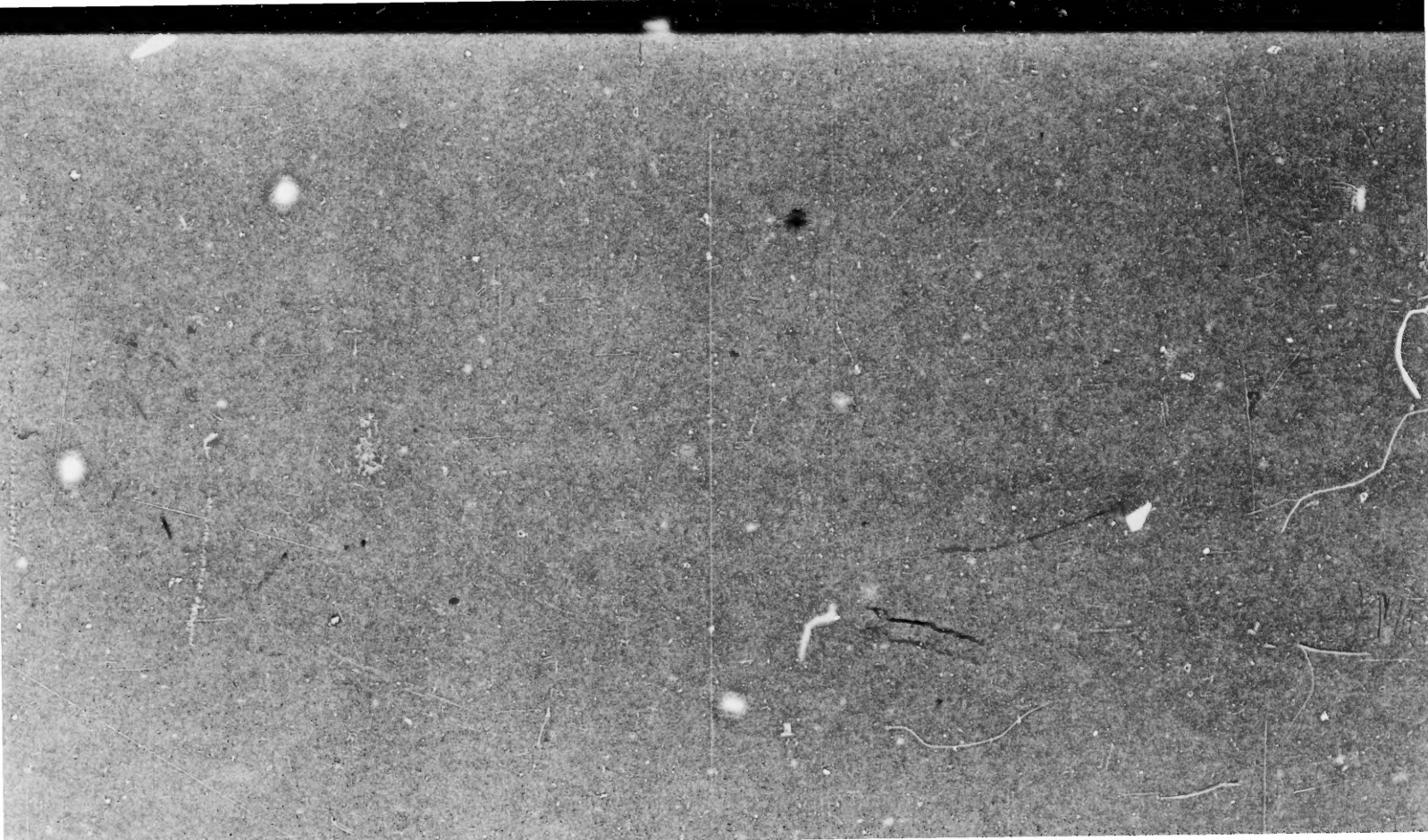

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The two Motions to Affirm filed in this case, one by the Government and the other by the carrier-appellees, urge an interpretation of the statutory provisions here involved which rests on a number of fallacies dealt with in Part I hereof. Certain factual statements in the Motions which are irrelevant, although apparently intended to be prejudicial, are dealt with in the interest of correctness in Part II hereof.

I.

The Fallacious Arguments in the Motions to Affirm.

A. The Anomaly of the Commission's Construction: Two Exemptions Are So Applied as to Result in No Exemption.

Both Motions to Affirm admit—indeed they proclaim—that the actual effect of the Commission's interpretation,

upheld below, will be to prevent any non-certificated carrier engaged in transporting bulk commodities by water under the Section 303(b) exemption from employing its tows in the performance of Section 303(f)(2) towage of non-bulk freight for a regulated carrier. This result is reached although admittedly Section 303(f)(2) provides that such towage is not subject to the Act.

Thus two exemptions add up to no exemption at all as a practical matter, when the unregulated carrier tries to take advantage of them. It is immaterial to him that the Commission considers that he has violated no law in performing the incidental towage itself, as long as the Commission couples this statement with the ruling that, immediately upon accepting the incidental towage, his movement of bulk traffic, previously lawful, has become unlawful. Nor is it any comfort to describe the two exemptions, as is done in the Government's Motion to Affirm, as a "personal exemption under §303(f)(2)" (p. 7), which survives, and a "narrow exemption" "for the carriage of particular commodities" (pp. 4, 7), which does not. These statements are a thin verbal disguise for the fact that the Commission has ruled that a bulk exempt carrier must not engage in incidental towage in spite of the language of Section 303(f)(2).

B. The Basic Error Below: Misunderstanding of the Statutory Function of Section 303(f)(2).

The arguments of both the Government and the carrier-appellees basically rest on a misconception of the relation of Section 303(f)(2) to Section 303(b). They treat Section 303(b) as if it existed in a vacuum and ignore the overriding statutory command in Section 303(f)(2).

Section 303(f)(2) by an overriding statutory definition constitutes towage for a regulated carrier as outside of "transportation" or "carrying" within the meaning of any

provision of the Act, including specifically any provision in Section 303.

This is accomplished by the language chosen to introduce Section 303(f). It reads:

> Notwithstanding any provision of this section [303] or of section 302 [the definition section[1]], the provisions of this part shall not apply • • •

The language just quoted is unique[2]. The phrase, "notwithstanding any provision of this section," gives subparagraph (f) preeminence over any other provision in Section 303, including subparagraph (b). The phrase, "notwithstanding . . . section 302," provides an overriding definition of what services constitute transportation *in law* within the meaning of the provisions of the Act. Legislative drafting in situations where an overriding exception is intended is most effective when that exception is stated in terms of definition. Thus in the New York Vehicle and Traffic Law,

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[1] For the text of pertinent definitions see J. St. 10, Note 3.

[2] None of the subparagraphs of Section 303, other than (f), refers either to "this section" or to Section 302. In the other subparagraphs, the introductory language reads as follows:

"§303(b). Nothing in this part shall apply to . . ."

"(c). Nothing in this part shall apply to . . ."

"(d). Nothing in this part shall apply to . . ."

"(e)(1). Notwithstanding any provision of this part the Commission may . . . exempt . . ."

"(e)(2). It is hereby declared to be the policy of Congress to exclude from the provisions of this part . . ."

"(g). Except to the extent that the Commission shall from time to time find, and by order declare, that such application is necessary . . ., the provisions of this part shall not apply to . . ."

"(h). The Commission shall have the power to determine . . . [and] [u]pon so finding the Commission shall issue a certificate of exemption to . . ."

"(j). Nothing in this part shall be construed to . . ."

"(k). Nothing in this part shall authorize the Commission to . . ."

it is carefully and expressly provided that a police car driven by a police officer is "not a motor vehicle" for purposes of that statute. *McKinney's New York Vehicle and Traffic Law*, §2(8).

As is developed in the Statement as to Jurisdiction (pp. 13-15), legislative history fully confirms the intention of Congress to use Section 303(f)(2) as a definition section so as to give the tower for a certificated carrier the status of a non-carrier as to that service and to treat towage service when performed for a certificated carrier as not constituting transportation ("carrying") by the tower within the meaning of any provision of the Act. To accomplish this purpose Congress carefully used the unique, all-embracing and overriding introductory language above quoted. When the clear purpose of Congress is given effect, the physical presence in the tow of the towed barge of non-bulk freight is not in law a circumstance which bears upon the Section 303(b) exemption.

If the physical make-up of the tow were the sole test of the Section 303(b) exemption, it would lead to the absurd result that a tower's provisions and supplies, some of which are non-bulk and all of which are "physically present" in the tow, would make the exemption unavailable. The Section 303(b) exemption is made inapplicable only when the cargo space in the vessel in question "is being used for the carrying" of more than three bulk commodities. For example, if a non-bulk commodity is transported by the operator of the tow as a carrier for hire within the meaning of "transportation" and "carrier" as used in the Act—as was the situation in the cases cited in the footnotes on page 6 of the Government's Motion (Note 4) and page 10 of the carrier-appellees' Motion—the exemption is lost.

But that which is not carriage under the Act cannot be treated as carriage under Section 303(b). Towage of non-

bulk freight for a certificated carrier is explicitly excluded from every section of Part III of the Act. Such towage is no more carriage by the tower than is the movement of tower's provisions and supplies which, though physically conducted in the tow, is clearly not carriage within the meaning of the Act.

Section 303(f)(2) is neither merely an exemption of a person nor is it concerned solely with the "legal status" of the tower (see pages 7 and 13 of the Government's and carrier-appellees' Motions, respectively). Rather, it is a categorical exclusion of "transportation by water by any person • • • in the performance • • • of towage" from all of the provisions of Part III, specifically including Section 303(b).

Section 303(f)(2) is not implemented by acknowledging its application to barges towed, but ignoring its plainly stated purpose of removing those barges from any and all regulatory consequences as to the tower thereof. To hold that a non-certificated operator may rely upon Section 303(f)(2) as to non-bulk barges towed for certificated carriers, but that such reliance destroys the Section 303(b) exemption of its own bulk carriage in the same tow, is to deny the effect of Section 303(f)(2) and to make its use impossible in the stated circumstances.

The two Motions to Affirm have overlooked or ignored this one basic point which is at issue. Thus the Motion of the appellee-carriers (pp. 2-3) states the "Question Presented" as involving a ruling that "section 303(b) . . . is inapplicable to a single tow of barges, which a water carrier is *transporting*, comprised of barges under its own bill of lading containing not more than three bulk commodities and other barges containing non-bulk commodities being towed for a regulated carrier under the towage exemption in section 303(f)(2)." (Emphasis added.) The vice of the state-

ment is the assumption that "transporting" is a word of common meaning. In fact it is a word of art. As it is used in the Interstate Commerce Act, Section 303(f)(2) expressly makes it inapplicable to the towing of "other barges being towed for a regulated carrier."

The Government on page 7, note 6, of its Motion acknowledges appellants' contention but fails to distinguish between transportation *in fact* and transportation *as defined by law.* The Government thus overlooks the effect of Section 303(f)(2) in constituting the service of towage for regulated carriers as non-transportation for all purposes of regulation. Consequently, the Government fails to come to grips with the basic point in the case.

Both Motions cite *Interstate Commerce Commission* v. *Dunn,* 166 F. 2d 116 (5th Cir. 1948), as if in support of the Commission's interpretation. The actual holding in *Dunn* is without relevance to any point here involved. There the Commission sought to enjoin a motor carrier from transporting agricultural commodities in interstate commerce under the exemption in Section 203(b)(6) of the Act because the vehicles had been used *at other times* in transporting other freight. The court sustained the exemption against that attack. By way of dictum, the court said that the exemption of interstate transportation of agricultural commodities would be lost if the vehicle were used simultaneously to transport other freight in intrastate commerce (p. 117). However, as is specifically noted in *Interstate Commerce Commission* v. *Service Trucking Co.,* 186 F. 2d 400, 403 (3rd Cir. 1950),—cited by appellees themselves—that was not the basis for the decision in *Dunn.* Nor did the *Dunn* case deal with statutory phraseology or factual circumstances like those involved in this case. It should be noted that the dictum in *Dunn* was based on the problem of policing the agricultural exemption if other commodities

could be carried simultaneously, provided they moved in intrastate commerce. Obviously, no similar problem is presented in connection with Section 303(f)(2) towage in a tow with bulk freight.

The carrier-appellees also cite *Peters Common Carrier Application*, 73 M. C. C. 331 (Entire Commission, 1957). However, that case, which was recently followed in *Yates, Common Carrier Application*, 74 M. C. C. 209, 211 (Division 1, 1958), clearly supports appellants', and not appellees', views with respect to the simultaneous effectiveness of two exemptions separately defined. Peters, a motor carrier, transported general freight in interstate commerce within the limits of a single state. So long as those were his "sole" interstate operations, the second proviso of Section 206(a)(1) of the Act excepted him from those required to have a certificate of operating authority from the Commission. However, Peters also conducted interstate operations in the transportation of agricultural products under the Section 203(b)(6) exemption. The question was whether the performance of those interstate operations, exempt as to the agricultural products carried, destroyed the single state exemption as to other commodities. The Commission held squarely it did not, saying at pages 335-336:

> "The phrase 'operation solely within any State' as used in section 206(a) should be construed in a restricted sense in conformity with the intention of the Congress expressed in section 203(b)(6) of the act. The propriety or necessity of thus construing the phrase is apparent, for all sections of an act should be in harmony with the intent of the act and with the intent of each section."

C. Neither the Purposes of Section 303(b) Nor the Purposes of the Act as a Whole Provide Rational Support for the Commission's Interpretation.

A convenient summary of the legislative history of Section 303(b) presented at a Congressional hearing in 1956[3] shows that the transportation of bulk freight on the inland streams was exempted from regulation because Congress considered such transportation entitled to the same exemption as bulk transportation on the Great Lakes. Congress reasoned that bulk transportation by water was noncompetitive with services rendered by regulated common carriers, whether by land or by water, so that regulation thereof was unwarranted.

Tested in the light of this congressional purpose, the adding of a barge of non-bulk freight being towed for a certificated carrier to a tow of bulk freight makes no change in this non-competitive relationship between bulk carriage and regulated common carriage generally. Consequently the original basis for exempting the transportation of the bulk freight still obtains, regardless of the added towage. This added towage is not done in competition with regulated common carriers; it is done for them. It follows that no apparent purpose of Section 303(b) with respect to the conditional exemption of bulk freight is defeated by the simultaneous operation of the Section 303(f)(2) exemption of towage.

In short, the simultaneous operation of these two exemptions is entirely consistent with all regulatory purposes of the Act. This follows since the barges towed for a regulated carrier under Section 303(f)(2) continue to be fully regulated as to such carrier within the regulatory framework

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[3] Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce on H. R. 6141 and other bills, *Transportation Policy*, 84th Cong., 2nd Sess., Part 3 at 1513-28.

of the Act, while the three or less bulk commodities continue to be exempt from regulation as intended by Congress.

While appellees say that legislative history supports the interpretation accorded Sections 303(b) and 303(f)(2) by the Commission, their Motions show nothing which supports their claim. The single circumstance to which they point is the rejection of an amendment offered in the House by Mr. Pittenger which would have exempted bulk freighters on the Great Lakes from regulation with respect to the on-deck transportation of automobiles for other carriers (Government's Motion, p. 5; Carrier-Appellees' Motion, pp. 11-12). However, as the Commission itself notes in its report in *Water Carrier Services on the Great Lakes with Non-owned Vessels,* 285 I. C. C. 419, 423-24 (Division 4, 1953), that amendment was rejected because Congress feared that its purpose was to exempt the transportation of new automobiles from all regulatory provisions of Part III of the Act. That being so, the Motions to Affirm cite nothing from legislative history which supports the interpretation for which they contend.

II.

Certain Other Matters Included in the Motions to Affirm.

There are in the Motions to Affirm a number of factual statements which the appellants believe to be irrelevent to the legal question of statutory interpretation presented to the Supreme Court by this appeal.

Though irrelevant, they are apparently intended to be prejudicial. Furthermore, in considerable part, they are incorrect. Consequently appellants consider it necessary to deal with them sufficiently to correct these errors.

1. The Government's Motion is in error, no doubt inadvertently, when it states (pp. 2-3) that the appellants' corporate predecessors had as an *objective* of their merger in 1957 "the formation of an unregulated subsidiary corporation which, while transporting exempt bulk commodities for third persons, would, at the same time and in the same flotilla of vessels, perform towage for its regulated parent corporations." The evidence before the Commission taken at the hearings on October 17-18, 1956 in the merger case[4] showed that one of appellants' predecessors, as well as other non-certificated carriers engaged wholly in exempt transportation, performed extensively Section 303(f)(2) exempt towage in combination with Section 303(b) bulk freight transportation. That evidence also showed that many certificated carriers, including the carrier-appellees here, employed, as needed, the towage services under Section 303(f)(2) of a great number of non-certificated carriers who were simultaneously performing Section 303(b) bulk exempt transportation.[5]

It was the general and natural expectation that this situation would exist following the merger, since it had existed, exactly as described, for many years before, as authorized by the Commission's 1944 ruling. The carrier-appellees, who were the protestants in the merger case, urged, as one ground for their opposition, that the merger would facilitate such operations, and suggested (as far as appellants are aware, for the first time publicly) that such operations should not be permitted under the Act. Since appellants had then—as they have now—no desire

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[4] *Commercial Transport Corp.—Control and Merger*, 70 M. C. C. 535 (1957).

[5] See quotations from transcript in Brief of Petitioners of November 29, 1957, pp. 8-11 which, with all other briefs, constituted the record before the Commission which was filed in the lower court.

to violate or evade the law, and in order to sever this extraneous question from consideration in the merger proceeding, this proceeding for a declaratory order was initiated. Appellants simultaneously undertook that, if the Commission ruled against them as to the proper construction of the statute, they would promptly cease to engage in or use incidental towage of the type here at issue and would not again commence it unless the Commission's decision should be overruled by a court of competent jurisdiction. The appellants have strictly and in good faith complied with this undertaking since they made it in 1957. For the Government to permit the inference from its Motion to Affirm that the 1957 merger had as an objective the institution of such a practice of incidental towage, when the interruption of this long-established practice came, in fact, as an indirect result of the activities of the parties to the merger case, can only be an oversight.

2. The Motion to Affirm of the carrier-appellees contains a number of extravagant statements as to the position of the water carrier industry on the issue presented (pp. 3-4, 17). The simple fact is that the parties to this case are limited to those who were parties, pro and con, to the merger case. What the position is of the many score other regulated carriers and the many hundred other non-certificated carriers is not shown by the record here. However, their non-participation in the merger case and here argues that they desired no change in the 1944 ruling. If their position was or is otherwise, it is a reasonable assumption that they would have joined the carrier-appellees in the Commission proceeding.

A survey provided at a Congressional hearing in 1956, at which transportation regulation was under consideration, shows that the inland waterway barge and towing vessel operators at that time numbered 1,732. Of these,

163 were certificated common carriers, 41 were regulated contract carriers, 521 were private carriers, and 1,007 were contract carriers engaged in exempt transportation.[6]

Insofar as the position of the regulated segment of the industry may be of interest, it would seem significant that only five out of 163 regulated common carriers by barge appear here in support of the Commission's 1957 ruling.

3. Additional statements are made by the intervening carrier-appellees to the effect that the exemptions from regulation here urged by appellants are against the industry's best interests (Motion to Affirm, pp. 17-18). These statements are unsupported in the record and appellants believe unsupported by any rational economic analysis (See J. St. 17-21, Point I C, *supra*). In considering, however, what weight should be attached to the general position of the carrier-appellees on the construction of Sections 303(b) and 303(f)(2), it may be pertinent to note that the point of view expressed by them in the Motion to Affirm is one admittedly antagonistic to all exemptions whatsoever. The reasons of the competing railroads for joining in the Motion to Affirm are nowhere stated, but their natural and usual point of view is against any sound expansion or development of water transportation.

There are no findings in the report of the Commission, Division 4, with respect to the economic impact of the 1957 reversal of the 1944 ruling. However, Commissioner Arpaia directed a part of his dissent to that matter. He said:

> "Indeed, the purpose of section 303(f)(2) would be seriously impaired if the use of that exemption precluded reliance by the user of the section 303(b) exemption. That is to say, if a carrier performing incidental towage of nonbulk commodities thereby

[6] Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce on H. R. 6141 and other bills, *Transportation Policy*, 84th Cong., 2nd Sess., Part 3 at 1494, 1513.

forfeits the section 303(b) exemption, he must either possess a certificate and move his own bulk traffic under regulation when performing incidental towage for another carrier, or he must limit the particular operation exclusively to the performance of incidental towage.

"The result would be to severely restrict the service of incidental towage and would produce wasteful transportation. An unregulated carrier would not want his bargeload included in the tow with other carriers' barges not subject to the exemption, because it would thereby lose its exemption. The practical effect of such interpretation would be therefore to limit the performance of incidental towage—a result directly in conflict with the purposes of section 303(f)(2)." (J. St. Appendix B, p. 43)

4. Traffic moved on the river in reliance upon the simultaneous availability of the two exemptions here in issue from 1944 to 1957, when the Commission first announced the decision here appealed from. The 1944 interpretation of the law was issued at the direction of the Commission, Division 4, after the Bureau in charge had refused to rule in favor of both exemptions, as urged at that time by the regulated barge industry. Appellants do not understand the relevance of the assertions by appellees that this 1944 ruling was "informal," and that it was issued in time of war when "every conceivable measure was being employed to move the maximum amount of traffic" (Government's Motion, p. 6; Carrier-Appellees' Motion, p. 16). (Perhaps the appellees consider the economic movement of the maximum amount of traffic to be inappropriate in time of peace.)

5. The Government's Motion to Affirm (p. 6) also quotes the statement of the Commission in its opinion below that "that ruling [the 1944 ruling] was, in effect, reversed" by Division 4 in *American Barge Line Company, Petition for Declaratory Order*, 294 I. C. C. 796 (1955). In fact, how-

ever, that decision, although it expressly referred to the 1944 ruling, neither reversed it nor questioned its correctness. The Commission in the *American Barge Line* case was dealing with the converse situation, where it is the bulk exempt carrier whose barges are added to a tow operated by a regulated carrier moving mixed commodities. In that situation, Section 303(f)(2) was inapplicable by its very terms since the principal in the transportation of the bulk freight was not "a water carrier subject to this part" as to that transportation. That case did not involve, as does the instant case, the impact of the performance of Section 303(f)(2) towage on the transportation of bulk freight clearly exempt in the absence of the towage. Consequently there was no occasion in that case to rule on the question here presented.

Conclusion.

For the reasons set forth herein and in the Statement as to Jurisdiction, appellants respectfully urge that the question submitted is substantial and of general public importance and that the Supreme Court should have the benefit of oral argument and briefs on the merits.

Respectfully submitted,

DUDLEY B. TENNEY,
63 Wall Street,
New York 5, New York

NUZL. D. BELNAP,
One North LaSalle Street
Chicago 2, Illinois
Attorneys for Appellants.

CAHILL, GORDON, REINDEL & OHL
BELNAP, MCAULIFFE & SPENCER,
Of Counsel.

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